COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF PUBLIC UTILITIES

JOINT PETITION FOR APPROVAL OF MERGER BETWEEN NSTAR AND NORTHEAST UTILITIES, PURSUANT TO G.L. c. 164, § 96	:	D.P.U. 10-170

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association ("RESA")[1] hereby submits its comments in response to the Department of Public Utilities' ("Department") Notice of Filing and Public Hearing, dated December 14, 2010 ("Notice").

INTRODUCTION

On November 24, 2010, NSTAR Electric Company, NSTAR Gas Company and their parent holding company NSTAR ("NSTAR") and Western Massachusetts Electric Company and its parent holding company Northeast Utilities ("NU") (together with NSTAR, the "Applicants") filed a joint petition with the Department seeking approval, pursuant to G.L. c. 164, § 96, to merge NSTAR and NU into a consolidated organization (the "Petition"). Notice at 1. In response to the Petition, the Department issued the Notice and indicated that any person interested in participating in the evidentiary phase of

[1] RESA's members include ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant Energy Northeast LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

the proceeding must submit a petition to intervene and written comments by January 3, 2011. Notice at 2. RESA hereby submits comments in response to the Notice.

STANDARD OF REVIEW

The Department's authority to review and approve mergers is found at section 96, which provides in relevant part:

> Companies, except steam distribution companies, subject to this chapter and their holding companies may . . . consolidate or merge with one another . . . if . . . the department, after notice and a public hearing, has determined that such purchase and sale or consolidation or merger, and the terms thereof, are consistent with the public interest; provided, however, that in making such a determination the department shall at a minimum consider: proposed rate changes, if any; the long term strategies that will assure a reliable, cost effective energy delivery system; any anticipated interruptions in service; or other factors which may negatively impact customer service . . . .

G.L. c. 164, § 96.

The Department has construed the section 96 standard of consistency with the public interest as requiring a balancing of the costs and benefits attendant on any proposed merger or acquisition. D.P.U. 850, *Petition of Boston Edison Co. & BECO Electric Co. for Approval by DPU of Merger in Agreement & Plan of Merger* ("Boston Edison"), at 6-8. The Department has stated that the core of the consistency standard is "avoidance of harm to the public." *Boston Edison*, at 5. In particular, the Department has held that the section 96 public interest standard must be understood as a "no net harm," rather than a "net benefit" test. D.T.E. 99-47, *Joint Petition of Massachusetts Electric Company and New England Power Company, Subsidiaries of New England Electric System and Eastern Edison Company, Subsidiaries of Eastern Utilities Associates for Approval by the Department of Telecommunications and Energy of Eastern Edison Company's Merger into Massachusetts Electric Company* ("Eastern

Edison-Massachusetts Electric Merger"), at 17; D.T.E. 99-19, *Joint Petition of Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company and Commonwealth Gas Company for Approval of Rate Plan* ("Boston Edison-ComEnergy Acquisition"), at 11; D.T.E. 98-128, *Joint Petition of Eastern Enterprises and Colonial Gas Company for Approval of a Merger by the Department of Telecommunications and Energy* ("Eastern-Colonial Acquisition"), at 5.

The Department must consider the special factors of an individual proposal to determine whether it is consistent with the public interest. *Eastern Edison-Massachusetts Electric Merger*, at 17; *Boston Edison-ComEnergy Merger*, at 11; *Eastern-Colonial Acquisition*, at 5; D.T.E. 98-31, *Joint Petition of Bay State Gas Company, Northern Indiana Public Service Company and NIPSCO Acquisition Company for Approval of a Merger and Related Transactions* ("NIPSCO-Bay State Acquisition"), at 9-10; D.T.E. 98-27, *Joint Petition of Eastern Enterprises and Essex County Gas Company for Approval of a Merger by the Department of Telecommunications and Energy* ("Eastern-Essex Acquisition"), at 8; D.P.U. 93-167-A, *Investigation by the Department on its Own Motion, Pursuant to G.L. c. 164, § 76 and § 96, for the Purpose of Establishing Guidelines and Standards for Acquisitions and Mergers of Utilities, and Evaluating Proposals Regarding the Recovery of Costs for Such Activities* ("Mergers and Acquisitions"), at 7-9. In doing so, section 96 expressly requires the Department to consider, at a minimum, the following four factors: (1) any proposed rate changes; (2) long-term strategies that will assure a reliable, cost-effective energy delivery system; (3) any anticipated interruptions in service; and (4) other factors that may negatively impact customer service. In addition, the Department has held that the following factors may be

considered in determining whether a proposed merger or acquisition is consistent with the public interest: (1) effect on rates; (2) effect on the quality of service; (3) resulting net savings; (4) effect on competition; (5) financial integrity of the post-merger entity; (6) fairness of the distribution of resulting benefits between shareholders and ratepayers; (7) societal costs; (8) effect on economic development; and (9) alternatives to the merger or acquisition. *Mergers and Acquisitions*, at 7-9. Furthermore, depending upon the nature of the transaction, in determining whether the transaction is consistent with the public interest, the Department may consider additional factors not delineated in the statute or in the nine factor test. *Eastern Edison-Massachusetts Electric Merger*, at 18; *Boston Edison-ComEnergy Merger*, at 12; *Eastern-Colonial Acquisition*, at 6.

The Department's determination whether the merger or acquisition meets the requirements of section 96 must rest on a record that quantifies costs and benefits. *Eastern Edison-Massachusetts Electric Merger*, at 18; *Boston Edison-ComEnergy Merger*, at 12; *Eastern-Colonial Acquisition*, at 7; *NIPSCO-Bay State Acquisition*, at 11; *Eastern-Essex Acquisition*, at 9. A section 96 petition that expects to avoid an adverse result cannot rest on generalities, but must instead demonstrate benefits that justify the costs. *Eastern Edison-Massachusetts Electric Merger*, at 18; *Boston Edison-ComEnergy Merger*, at 12; *Eastern-Colonial Acquisition*, at 7; *NIPSCO-Bay State Acquisition*, at 11; *Eastern-Essex Acquisition*, at 10; *Mergers and Acquisitions*, at 7.

COMMENTS

Generally, a regulated monopoly should not be permitted to leverage its regulated position to gain an advantage over competitive entities. Accordingly, new resource development must not be allowed to shift investment risks onto captive ratepayers to the

harm of competitive entities who must bear those investment risks themselves and must succeed on the basis of price in the competitive electric market. Indeed, allowing such investment risks to be passed on to retail customers through the regulated portion of their electric bills will harm retail competition by lessening the relative value of choice and the impact customers can have on their total electric bill by choosing competitive suppliers who offer clean energy and demand response alternatives.

Moreover, through the provisions of the Green Communities Act, Massachusetts already has a means by which regulated utilities can seek proposals for renewable resources from unaffiliated entities in a competitive process. *See* An Act Relative to Green Communities, Chapter 169 of the Acts of 2008, § 83. Given the existence of this process and the robust support provided to renewable developers through the Renewable Portfolio Standard, there is no need for utilities themselves to pursue incremental renewable development or development intended to bring additional resources to market at ratepayer risk. Indeed, through the Green Communities Act, the Legislature has already limited the ability of regulated distribution companies to develop renewable resources on a cost-of-service basis to no more than 50 MW of installed solar capacity. *See* An Act Relative to Green Communities, Chapter 169 of the Acts of 2008, § 58. Any order approving the merger should expressly hold the merged company to this statutory limitation.

When the Spanish utility and renewable resource developer Iberdrola acquired Energy East, the company entered into a stipulation with stakeholders in the State of Maine to restrict the company's ability to construct rate-based generation or to advocate for a change in law to permit such regulated generation development for a term of seven

(7) years. *See* Maine Public Utilities Commission, Docket No. 2007-355, *Central Maine Power Company and Maine Natural Gas Corporation Reorganization/Acquisition of Energy East Corporation and Iberdrola, S.A.*, Stipulation, dated January 9, 2008, at 13-14. Similarly, the State of New York required that the company agree to divest an existing generation facility and accept limitations on any preferential treatment in the interconnection of its own generation resources. *See* New York Public Service Commission, Docket No. 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, Order Authorizing Acquisition Subject to Conditions, dated January 6, 2009. Indeed, the New York Public Service Commission has adopted a standing Policy on Vertical Market Power, which guided their decision in the Iberdrola case and supported the imposition of conditions to prevent an adverse impact from the merger upon competitive energy markets. *See* New York Public Service Commission, Docket No. 96-E-0900, *Plans for Electric Rate Restructuring*, Statement of Policy Regarding Vertical Market Power, dated July 17, 1998.

To ensure competitive parity, RESA recommends that the Department impose similar conditions upon the combined NU-NSTAR company as those Iberdrola accepted in Maine and New York. In particular, RESA recommends that the Department impose conditions similar to the following that were adopted in Maine:

(a) For a seven year period beginning on the date of the Department's approval of the proposed merger, the Applicants and their affiliates will not propose or advocate to change Massachusetts law that limits

ownership or control of, or financial interest in, generation directly by the Applicants;

(b) To the extent that Massachusetts law allows the Applicants to own, control or have a financial interest in generation, directly or indirectly, Applicants shall implement structural separations and standards of conduct that will prevent its generation interest from having a competitive advantage over other potential market participants, such separations and standards being subject to review by the Department and by the Federal Energy Regulatory Commission;

RESA also recommends that the Department impose conditions similar to the following that were adopted in New York:

(a) Applicants and any of their affiliates are prohibited from owning any interest in fossil generation within Massachusetts;

(b) Consistent with and to the extent allowed under these conditions, any investments in renewable energy facilities shall be carried out through subsidiaries of the merged company other than the regulated delivery companies within Massachusetts;

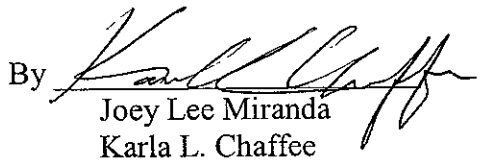
(c) Applicants shall not engage or enter into bilateral power purchase contracts with any affiliate, subsidiary or other entity in which the merged company has a direct or indirect financial interest either in the entity or in the project; and,

(d) Applicants shall file with the Department, within 60 days of the issuance of an order approving the transaction, documents clearly defining the interconnection criteria and the process and procedures that would provide interconnections to generators, and shall file promptly any subsequent changes to the documents.

CONCLUSION

RESA appreciates the opportunity to submit these comments and looks forward to continuing to participate in this proceeding.

Respectfully submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By 

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Dated: January 3, 2011

Certificate of Service

I certify that I have this day served the foregoing document in the above-captioned proceeding in accordance with the requirements of 220 C.M.R. § 1.05.

Karla L. Chaffee

Dated: January 3, 2011